

PRIVILEGED AND CONFIDENTIAL  
ATTORNEY/CLIENT COMMUNICATIONS

REPORTERS: Allen R. Purvis  
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TRIAL REPORT  
SUMMARY/TESTIMONY/PROJECTION

CASE NAME: Cipollone      DATE: 10-May-88 a.m.      PAGE 1 OF 3

SUMMARY:

Before bringing the jury in this morning, Sarokin announced that he had ruled on defendants' application to read Rose's deposition from her 1981 automobile lawsuit and would permit selected portions to be read in a manner that would not indicate that this was testimony from another lawsuit. Sarokin then heard additional argument on Edell's proposed use of additional post-1966 company documents which were critical of CTR research. After leaving the bench to consider his decision, he returned and read an opinion he had obviously prepared over the weekend which permitted Edell's use of such documents "because they are highly probative of plaintiff's misrepresentation claim."

After Dr. Spears concluded his testimony with continued cross by Edell and redirect by Northrip, the defense called Dr. Barker to the stand.

WITNESS: Dr. Alexander W. Spears

IDENTITY: Lorillard Executive V.P. of Operations and Research

EXAMINER: CROSS: Marc Edell      TIME: 0 hrs. 30 min.

REDIRECT: Robert Northrip      TIME: 0 hrs. 25 min.

RECROSS: Marc Edell      TIME: 0 hrs. 05 min.

RE-REDIRECT: Robert Northrip      TIME: 0 hrs. 05 min.

RE-RECROSS: Marc Edell      TIME: 0 hrs. 01 min.

TESTIMONY:

Edell proceeded with his cross by confronting Spears with a 1980 letter from Seligman which described the following as research areas to avoid: developing carcinogenicity tests; attempting to relate human disease to cigarette smoking; and experiments that involve large doses of tar concentrate to show an additive effect. Edell also confronted Spears with a 1971 PM document which also

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suggested that CTR research was being used by the industry for public relations and litigation purposes. Spears denied being aware of any instance where CTR research was used for those purposes. Spears also said he had never seen Osdene's handwritten notes of a meeting attended by research directors and lawyers to discuss company research. Edell read portions of the notes which included statements that the industry should "control" research and "The time for propaganda is over."

To rebut Spears' testimony that the early epidemiological results were inconsistent, Edell cited a 1954 article that praised the early studies and their consistent conclusion of a statistical relationship. When pressed by Edell on his conclusion after reviewing all of the literature on smoking and health between 1959 and 1965, Spears refused to say that he concluded that there was a "real possibility" that cigarette smoking caused lung cancer and continued to insist that it was either proven or not proven -- there's nothing in between.

On redirect, Northrip referred Spears to the Seligman letter and had him note that the majority of the letter was devoted to proposals for obviously relevant research. Spears indicated he did not necessarily agree with the portion of the letter that discussed subjects to be avoided and suggested that a more likely interpretation of that portion of the letter was that those subjects were either already being done by the government or other agencies, or were simply outside the scope of CTR.

With respect to Homburger's pesticide research, Spears explained the results were not published because DDD had already been reported as a minute component of smoke and, in any event, the USDA was removing it from the approved list of pesticides. To refute Edell's suggestion that by 1965 almost 100 carcinogens had been identified in tobacco smoke, Spears indicated he had consulted the 1964 SG Report and found a list of 12. The redirect concluded with Spears explaining that he told Lorillard management that epidemiological studies could only show a statistical association and that autopsy data and animal studies were needed to prove causation.

On recross, Edell brought out that the tobacco industry spent millions on skin-painting but continues to insist that the results cannot be extrapolated to man. Edell noted that Spears relied on the SG Report for his data on carcinogens but did not rely on it for its conclusion that cigarette smoking causes lung cancer.

On re-redirect, Spears again explained his view on the validity of skin-painting before 1966 noting that large quantities of concentrate were used on the backs of specially bred mice -- not on respiratory tract tissue. The inability to produce tumors in inhalation experiments exemplifies the difficulty of trying to extrapolate from one animal to another -- "but mouse skin-painting is the only game in town."

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WITNESS: Dr. Walter L. Barker

IDENTITY: Defendants' Specific Causation Expert

EXAMINER: DIRECT: Robert Northrip TIME: 0 hrs. 25 min.

VOIR DIRE: Cynthia Walters TIME: 0 hrs. 10 min.

TESTIMONY:

Northrip called Dr. Walter L. Barker, a Harvard-trained thoracic surgeon, who holds staff and teaching positions at several Chicago area hospitals. In addition to listing his experience and honors, Barker explained how surgeons rely on x-rays, lab reports, pathological reports and bronchoscopy results to make diagnoses. Barker has performed over 2,000 thoracic surgeries and has treated over 4,000 patients with lung cancer -- 200-250 small cell cases and 40 carcinoids (8 or 9 of which were ATC).

Walters' voir dire noted that Barker has never written an article on lung cancer and had testified at deposition that he had not yet reviewed Rose's pathology slides even though his testimony suggested no cell type diagnosis could be made without reviewing the slides. Walters then moved to prevent Barker from testifying as to the cell type of Rose's tumor but, after extensive argument outside the hearing of the jury, Sarokin overruled her objection.

ASSESSMENT:

Over the weekend, Sarokin had obviously prepared his opinion on the admissibility of post-1966 company documents commenting on CTR research. Arguments by defense counsel that he was expanding the scope of preempted evidence plaintiff would be allowed to use forced him to take a recess to consider his opinion, but he proceeded to read it as written. His opinion began by noting that "The Court is once again called to walk the difficult line between pre-1966 and post-1966 evidence." When Bleakley pointed out that plaintiff was being allowed to use post-1966 evidence to attack CTR's research but defendants were being denied the opportunity to introduce evidence defending that research, Sarokin angrily replied "The record will show otherwise, Mr. Bleakley."

Barker is a distinguished-looking gray-haired gentlemen who speaks authoritatively. He has never testified for the industry; his partner (Langston) has testified on behalf of the industry on several occasions and Edell is aware of this fact.

PROJECTION:

Barker's direct will last the rest of the day.

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